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Attn: Randy Bates

FAX: 465-3075



ALASKA CENTER *for the* ENVIRONMENT

807 G Street, Suite 100 • Anchorage, Alaska 99501

907-274-3621 phone • 907-274-8733 fax • ace@akcenter.org • www.akcenter.org

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Randy Bates, Director
Division of Coastal and Ocean Management
Department of Natural Resources
PO Box 111030
Juneau, AK 99811-1030

August 14, 2008

Dear Mr. Bates:

The Alaska Center for the Environment is submitting the following comments in response to the invitation Department of Natural Resources (DNR) issued in its letter of July 1, 2008 to comment on and propose changes to the Alaska Coastal Management Program (ACMP). The Alaska Center for the Environment is a non-profit environmental education and advocacy organization, whose mission is to enhance Alaskans' quality of life by protecting wild places, fostering sustainable communities and promoting recreational opportunities. We advocate for sustainable policy on behalf of nearly 7,000 Alaskan members.

Our comments reflect our concern that the ACMP is not meeting the very first goal of the Coastal Zone Management Act of 1972 to "preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations" [16 U.S.C. 1452 (1)]. The statutory amendments in 2003 and regulatory revisions in 2004 removed the ability of coastal managers to ensure balance in the statewide standards, district enforceable policies, and consistency determinations. The revisions shifted the balance of the ACMP from a network of State and coastal districts to a State run program and from a balance of protection and development to a primacy for development.

It is our belief that the success of the ACMP rests in the vigor of the enforceable policies and the ability of all stakeholders to participate in the program in a meaningful way. Our comments reflect this belief and are organized into the following sections:

- I. Introduction
- II. Statewide Standards
- III. Definitions
- IV. Recreating a Networked Program
- V. District Programs
- VI. Coordinated Review Process including the DEC Carve Out

Thank you for the opportunity to comment. We look forward to working with DNR, coastal districts and other ACMP stakeholders during this revision process and request that we be included in stakeholder meetings.

Sincerely,

Valerie Connor
Interim Director
Alaska Center for the Environment
807 G St. Suite 100
Anchorage, Alaska 99501

Enclosure



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I**Introduction****2008 AUG 14 PM 2:45*****Statement of Problem:***

Coastal management is a program to “preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations” [16 U.S.C. 1452 (1)]. Alaska’s revised coastal management program (ACMP) fundamentally fails to meet this core philosophy of coastal management. The statutory amendments in 2003 and regulatory revisions in 2004 removed the ability of coastal managers to ensure balance in their consistency determinations. The program, as modified, strives to ensure primacy of existing state statutes and regulations and to minimize a coastal district’s ability to refine existing State policies. The revisions shifted the balance of the ACMP from a network of State and coastal district enforceable policies to a state run program and from a program that balanced protection and development to one that emphasized development.

Changes leading to this end include:

1. Creating a “super power” in the Alaska Department of Natural Resources (DNR). The statute eliminated the Coastal Policy Council (CPC) and the CPC responsibilities were placed in DNR. The Habitat Division of the Alaska Department of Fish and Game (ADF&G), which had responsibility for reviewing and issuing stream-related permits was moved into DNR; therefore, most permits associated with a coordinated review for consistency with the ACMP were placed into DNR. Ultimate authority for both plans and permits was placed in the Commissioner of DNR. The strangle hold on ACMP decisions by DNR was partially mitigated in 2008 when the Habitat Division was returned to ADF&G.
2. Removing the Alaska Department of Environmental Conservation (DEC) permits from the coordinated review process and disallowing all district policies that addressed aspects of air, land, and water quality – even those that DEC did not actively manage.
3. Refusing to accept coastal districts’ enforceable policies in areas subject to state statute or regulation – including topics not currently covered in regulation, but that could become subject to regulation.
4. Restricting the scope of consistency reviews both geographically and topically. The 2004 regulations limited the inland extent of several statewide standards; limited application of enforceable policies to designated areas that needed to be established using data not generally available; eliminated social, environmental and economic concerns from the definition of the term “practicable,” which is the term that replaced “feasible and prudent” in the statewide standards.
5. Modifying statewide standards to limit their application and reduce protection for environmental and social concerns.

The following sections recommend changes to rectify the deficiencies in the current ACMP.

II.

Statewide Standards

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Statement of Problems with Statewide Standards:

Program modifications lowered the statewide standards applicants needed to meet to achieve consistency, removed policy areas subject to review, removed portions of the coastal zone from regulatory requirements, required avoidance and minimization of impacts to the maximum extent that is practicable and then defined practicable in terms of cost, technology, and logistics; and limited mitigation requirements. A significant consequence of the changes was to shift the burden of proof from developers proving the development has no impact to the coastal district or state agency to prove an impact may occur. As it now stands, the applicant's position often has deference.

These changes diminished the State's ability to ensure developments meet the goal of coastal management to "preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations."

Statutory or Regulatory Citation, if applicable:

Multiple – see below for citations for each statewide standard.

Explain your solution to the problem and how it resolves the problem:

Recommendations are provided for each statewide standard as follows:

Coastal Development Standard (11 AAC 112.200)

The revisions limited the coastal development standard to coastal waters. The solution is to revise coastal development standard so it applies all shorelines within the coastal zone. Replacing "coastal waters" with "coastal zone" ensures that priority for all development placed on a shoreline within the coastal zone is given to uses and activities that require such a location.

Natural Hazards Standard (11 AAC 112.210)

Due deference provided to coastal districts and resource agencies in their field of expertise and the additional evidence that supports their comments has been undermined by provisions in 11 AAC 112.210 (d) (2) that place the burden of proof on participants to prove that the project engineer has not adequately addressed the natural hazard and that the plans adequately address the specific natural hazard. The solution is to revise the wording in this statewide standard to include a "due deference" provision for resource agencies and coastal districts with an approved plan that is comparable to the definition in 11 AAC 110.255. See also proposed revisions to definitions. The "due deference" provision provides additional criteria for ensuring that the "other local and state agencies with expertise" noted in (d) actually receive due deference and the burden of proof shifts to the applicant.

Coastal Access Standard (11 AAC 112.220)

11 AAC 112.220 included only section (b) of 6 AAC 80.060, the pre-2004 Recreation standard. It further limited the original standard by applying it only to salt water rather than the entire coastal zone. The solution is to reinstate the applicability of the standard to the entire coastal zone and add a modified version of 6 AAC 80.060 (a) that recognizes the importance of

recreation and requires conformance with district policies and designated areas for recreation. This change would enable districts to tailor the statewide standard to the local situation and identify areas for recreational purposes, if applicable.

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Energy Facilities (11 AAC 112.230)

6AAC 80.070 (12) was subdivided into two parts. The second clause, which became 111 AAC 112.230 (13), modified the requirement that facilities must be sited so that "areas of particular scenic, recreational, environmental, or cultural value" were to be protected by requiring that these areas had to be identified in advance. There are two problems this advanced identification. First, many areas in the state meet the criteria and given the expansiveness of Alaska's coastal zone, it would be nearly impossible to identify all such areas in advance. The second problem was with the implementation of the current program. As the final decision maker, DNR did not accept most enforceable policies related to energy facilities, and all proposed policies addressing oil and gas activities. Another change to the new statewide standard was the elimination of 6 AAC 80.070 (15). As a result, the State removed the requirement that sites for energy facilities were to be selected in "areas which are designated for industrial purposes and where industrial traffic is minimized through population centers." To rectify the shortcomings in 11 AAC 112.230, the phrase "identified in district plans" in (13) should be eliminated and 6 AAC 80.070 (15) should be reinstated.

Utility Routes & Facilities (11 AAC 112.240)

6 AAC 80.080, Transportation and Utilities, included both linear-type projects within the same standard. 6 AAC 112 separated transportation and utility routes and facilities into two standards. The separation of utilities and transportation is not inherently problematic. Rather the problem was restricting the ability of coastal districts to have enforceable policies that expand the scope of review and of participants to incorporate those issues through the assessment of "feasible and prudent alternatives." Here, too, the burden of proof shifted from the applicant convincing decision makers that no impacts would occur to the coastal district, state agency, or the public to convince DNR that impacts would occur. To resolve the problem, 11 AAC 112.240 should be amended to encourage districts to provide additional enforceable policies to reflect conditions of their coastal area and projects should be required to be compatible with district plans. Also, see proposed revisions to definitions concerning due deference.

Fish and Seafood Processing (6 AAC 80.090)

The benefit of addressing seafood processing within the holistic approach of the coastal management program was eliminated when this statewide standard was removed from the 11 AAC 112 regulations. To resolve the problem, reinstate the standard to enable districts in areas where seafood processing is important to develop enforceable policies.

Timber Harvest and Processing (11 AAC 112.250)

Both the original standard (6 AAC 80.100) and the revised statewide standards defer to the Forest Practices Act. No changes are recommended to the ACMP. Ideally the FPA would be modified to allow all ACMP policies to apply to the review of timber harvests and processing.

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Mining and Mineral Processing (11 AAC 112.260)

11 AAC 112.260 dropped all mining activities except for sand and gravel restricted the area covered to coastal waters and some areas immediately adjacent to coastal waters, and amended section (a) of 6 AAC 80.110, which required that mining and mineral processing be performed compatibly with the adjacent uses and activities, with the needs at the national and state levels of government, and conform to district enforceable policies. To resolve the deficiencies created by the new policy, compatibility with district programs should be added that is comparable to 6 AAC 80.110 (a), all types of mining activities need to be included, and the policy needs to be applied to the entire coastal zone. Also, see proposed changes to definitions, especially "practicable". Mining impacts on coastal uses and resources occur from activities sited throughout the coastal zone, not just in coastal waters. These changes provide adequate protection for coastal uses and resources by strengthening the standard and ensuring impacts from all mining within the coastal zone are covered.

Statewide Subsistence Standard (11 AAC 112.270)

Subsistence is a priority in many places in Alaska. The previous subsistence statewide standard recognized the importance and required that districts and state agencies recognize and assure opportunities for subsistence usage of coastal areas and resources (6 AAC 80.120 (a)). However, under the revised regulations, DNR did not approve any policies with a subsistence priority even though the 2005 federally-approved program description states that such policies would be approvable. The concept of designated areas also plays into problems associated with 11 AAC 112.270; the proposed solution for designated areas is discussed in Chapter V, District Programs. For purposes of 11 AAC 112.270, the solution is to reinstate a specific ability of districts to establish enforceable policies without designating areas first. Adding a new clause to 11 AAC 112.270 to specify coastal districts may develop enforceable policies related to subsistence within their district would avoid a similar situation in the future. A revised definition for "due deference" is a necessary component to assure the local knowledge is accepted.

6 AAC 80.120 required that a study be conducted before a potentially conflicting use or activity may be authorized within areas designated as a subsistence zone and appropriate safeguards to assure subsistence usage must be provided. 11 AAC 112.270 requires a subsistence evaluation for designated areas; the standard should be modified to specify that the evaluation needs to address all aspects including the resources and well as access. Adding the term "resources" to each instance of "subsistence uses" would also be necessary before district or applicants could address resources under the subsistence standard.

Finally, 11 AAC 112.270 eliminates mitigation from the avoidance and minimization sequence. There is no way that each and every authorized use or activity is able to avoid all impacts to subsistence uses and resources. Minimizing impacts by definition infers that some impact will occur. Those impacts must be compensated. Add mitigation to the sequence, after all efforts to avoid and minimize have been taken.

Transportation & Facilities (11 AAC 112.280)

6 AAC 80.080, Transportation and Utilities, included both linear-type projects within the same standard. 6 AAC 112 separated them into two standards. The separation of utilities and transportation is not inherently problematic. Rather it was the changes restricting the ability of

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districts, state agencies and the public to incorporate those issues through the assessment of "feasible and prudent alternatives." Here, too, the burden of proof shifted from the applicant convincing decision makers that no impacts would occur to review participants to convince DNR that impacts would occur. To resolve the problem, 11 AAC 112.280 should be amended to encourage districts to provide additional enforceable policies to reflect conditions of their coastal area and projects should be required to be compatible with district plans. Also, see proposed revisions to definitions concerning the burden of proof.

Habitats Standard (11 AAC 112.300)

11 AAC 112.300 deleted provisions in 6 AAC 80.130 (b) that required the biological, chemical, and physical characteristics of a habitat that contributed to its capacity to support living resources from to be maintained or enhanced. The standard was replaced with a sequence that required applicants to avoid, minimize, or mitigate significant impacts to the extent practicable. The inclusion of the adjective "significant" and the definition of "practicable" precludes adequate protection of the state's resources and uses for this and future generations. In particular, the definition of "practicable" limits the issues to be considered to costs, technology, and logistics and fails to address social, environmental, and economic impacts at the state and coastal district levels. The habitat standard needs to be revised to correct this deficiency. The solution to this failure to protect state resources is to reinstate language comparable to 6 AAC 130 (b). Also, the management measures provide a process for the review whereby effects are avoided, minimized, and mitigated but do identify the end point that is needed for a healthy ecosystem. The three-part test in 6 AAC 130 (d) could be incorporated into the process for avoiding, minimizing, and mitigating adverse effects. These modifications provide the overall goal and a process for review. Changes to individual standards necessary to ensure the habitat goals are defined are itemized in the following paragraphs. An additional benefit of removing the process and the limitation of impacts to "significant adverse impacts" is it helps return the burden of proof to the applicant to meet the standard. This helps to correct the current situation where the burden of proof for identifying that an impact is significant falls to the review participant. See also the proposed definitions, especially "avoid, minimize, and mitigate" and "due deference."

6 AAC 80.130 (a) listed eight habitats subject to the habitat standard. 11 AAC 112.300 (a) revised two habitats. One revision dropped important upland habitat from the list, presumably relying on the ability of coastal districts to designate such areas in their plans. Given the inherent difficulty in identifying all such areas in advance and the failure of DNR to approve those that were identified, this revision must be remedied. Important upland habitat is vital to the consideration of impacts to uses and resources of the coastal zone. The best way to rectify the deficiency in fully considering impacts to uses and resources of the coastal zone is to restore important upland habitats to the list of protected habitats.

Corrections for each habitat in 11 AAC 112.300 are as follows. New language is underlined. "Significant" has been removed as the adjective for impacts in the sequence of "avoid, minimize, or mitigate adverse impacts."

- (1) Offshore areas: "must be managed as a fishery conservation zone so as to maintain or enhance the fish and wildlife resources and habitats and the state's sport, commercial, and subsistence fishery;

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- (2) Estuaries: "must be managed to assure (A) adequate water flow and natural water circulation patterns, fish and wildlife resources and habitats, and other habitat functions; and (B) to avoid affecting competing uses such as commercial, recreational, or subsistence fishing;"
- (3) Wetlands: "must be managed to assure water flow, natural drainage patterns, fish and wildlife resources that use the wetland habitat, and other wetland habitat functions."
- (4) Tidelands "and other intertidal areas must be managed to assure adequate water flow and natural drainage patterns, fish and wildlife resources and habitats, and other habitat functions;"
- (5) Rocky islands and seacliffs: "must be managed to avoid (A) impacts to habitat used by coastal species; (B) the introduction of competing or destructive species and predators; and (C) conflicts between activities and resources using the habitat and other habitat functions;"
Barrier islands and lagoons must be managed to maintain adequate flows of sediments, detritus, and water, avoid the alteration or redirection of wave energy which would lead to the filling in of lagoons or the erosion of barrier islands, and discourage activities which would decrease the use of barrier islands by coastal species, including polar bears and nesting birds;"
- (6) Exposed high energy coasts "must be managed (A) to maintain fish and wildlife resources and habitats; (B) to assure the adequate mix and transport of sediments and nutrients; and (C) to avoid redirection of transport processes and wave energy;"
- (7) Rivers, streams, and lakes "must be managed to protect (A) natural water flow; (B) active floodplains; (C) natural vegetation within riparian areas; (D) water quality; (E) fish and wildlife habitats; and (F) other habitat functions."
- (8) Important Upland Habitat (delete current (A) and (B)) and replace with "must be managed for (A) the special productivity of the habitat; (B) use of the habitat by fish and wildlife resources; and (C) other habitat functions."

11 AAC 112.300 (c) sets forth criteria for important habitat. Important habitat now includes the term "uplands" so this section is no longer relevant and should be deleted. Relevant portions that identify specific areas for inclusion in the various habitats can be incorporated into the definitions in 11 AAC 112.900.

Reinstate 6 the three-part test of AAC 80.130 (d) and add (4) that provides for mitigation:

Uses and activities in the coastal area that can not conform to the standards which the provisions contained in (a)(1) and (a)(2) of this section are being applied may be allowed by the district or appropriate state agency if the following are established:

- (A) there is a significant public need for the proposed use or activity;
- (B) there is no feasible alternative to meet the public need for the proposed use or activity that would conform to the standard(s) which the provisions contained in (a)(1) and (a)(2) of this section are being applied; and
- (C) all capable steps to maximize conformance with the standard(s) which the provisions contained in (a)(1) and (a)(2) of this section are being applied will be taken.

(D) effects that cannot be avoided or minimized shall be mitigated.

This policy does not preclude district policies from adding more specificity to state or federal law and regulation when this sequence is used in a statewide standard.

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Including 6 AAC 80.130 (d) provides a framework for reviewing projects that cannot meet the goals of the Habitat Standard. Adding (D) helps to bring the three-part test into conformity with the “avoid, minimize, and mitigate” sequence.

These modifications help the program come into compliance with the national objective to “preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations.”

Air, Land, and Water Quality (11 AAC 112.310)

Currently only ADEC can make determinations concerning air, land, and water quality. This DEC “carve out” from the ACMP coordinated review resulted in two unfortunate outcomes. The first negative outcome relates to this statewide standard discussion; the second will be covered under the discussion of the coordinated review process.

The solution proposed in 2004 was a response to issues raised when a coastal district repeated verbatim either 6 AAC 80.140 or another of ADEC’s regulations. The “fix” was draconian. The current statewide standard precludes coastal districts from developing any enforceable policies related to air, land, and water quality – even when they relate to issues that ADEC, prior to 2004, claimed they did not have regulations to give them that authority, such as smaller quantities of petroleum products. Coastal districts must be able to include enforceable policies to ensure the uses and resources of the coastal are preserved, protected, developed, and where possible, restored or enhanced for this and succeeding generations. The solution is to revise 11 AAC 112.310 to allow coastal districts an opportunity to develop enforceable policies related to air and water quality when an activity or use could affect coastal uses and resources that are not specifically or adequately addressed in DEC statutes or regulations. This solution allows districts the opportunity to establish enforceable policies where DEC policies are inadequate to meet the needs in the district to address impacts to the uses and resources of the coastal zone.

Historic, Prehistoric, and Archeological Resources (11 AAC 112.320)

6 AAC 80.150 allowed “districts and appropriate state agencies” the ability to identify areas of the coast important to the study, understanding, or illustration of national, state, or local history or prehistory. The 2004 revision restricted the ability to designate areas of the coast important for these purposes to the DNR. Although the State Historic Preservation Officer resides in DNR, SHPO lacks the resources to know all such areas. The standard fails to acknowledge the local and traditional knowledge of such resources. This standard must be revised to authorize coastal districts due deference in identifying historic, prehistoric, and archeological sites and resources.

Describe how the change would impact all ACMP participants:

The changes to the statewide standards would enable the State to develop policies that would preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations.

Districts would have the opportunity to develop enforceable policies in areas where they currently are unable or, through DNR interpretation have been unable, to tailor statewide standards to the local situation.

Applicants would have a new set of standards that would hold them accountable to a higher standard of review to ensure uses and resources of the coastal zone are protected. For some applicants, the new standards would not alter their proposals; for others for whom the standards were maximum rather than minimum standards to meet, the new statewide standards would require modifications to proposals that may make a project more costly.

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III. Specific Changes Definitions

Statement of Problems with Definitions 11 AAC 12.990:

The following paragraphs provide language to definitions that would correct problems with several definitions. The solution is followed by the problem to be fixed.

Statutory or Regulatory Citation:

11 AAC 12.990, AS 46.40.070 and AS 46.40.030 (b), 11 AAC 14.270

Explain your solution to the problem and how it resolves the problem:

The following definitions are to be added or refined:

Avoid, minimize, and mitigate: When this sequence is used in a policy, impacts to uses and resources of the coastal zone shall be avoided to the maximum extent practicable.

When impacts cannot be avoided, they must be minimized to the maximum extent practicable. When impacts cannot be avoided or minimized, impacts to resources or uses of the coastal zone shall be compensated commensurate with the impacts created.

Mitigation commensurate with the level and type of impacts shall be provided prior to commencing the activity or project. On-site mitigation is the highest priority. To the extent on-site mitigation of project impacts is not practicable, mitigation shall occur within the coastal district where coastal resources are affected.

The revised language overcomes problems with the current definition. Mitigation must occur at the beginning of the project, not at the end. Waiting until the end of the project life means that other uses and resources of the coastal zone would be impacted for an extended period with no compensatory actions taken to mitigate the impacts. The proposed language also overcomes the inability of districts to address issues important to the district whenever this sequence was used in the statewide standards. This includes the statewide standards for habitats, transportation, utilities, and subsistence. The rationale for this exclusion was based on the fallacy that the sequence covered the full range of impacts and restitution. Moreover, the sequence includes the word "practicable" which under the current definition further limits the scope of issues to be included. Proposed changes to the definition of practicable are below. In addition, the statute at AS 46.40.070 should be revised to clarify that district policies may cover matters that are not adequately addressed by the state or federal statutes.

Due Deference: make the definition comparable to the definition in 11 AAC 110.990(25), which states: "due deference means that deference that is appropriate in the context of the commenter's expertise or area of responsibility and all the evidence available to support any factual assertions of the commenter." Add a clause that specifies that the burden of proof is placed on the applicant to prove a lack of impacts, not the coastal district or resource agency to prove that an impact will occur.

Under current practices, review participants do not have due deference; the burden of proof rests with them, not the applicant. Applying due deference in project reviews resolves problems that arise when district policies are misinterpreted; districts are in the best position to understand the meaning of their enforceable policies, not applicants. Also, local knowledge of the habitat, uses, and resources is discounted if due deference is not afforded to the district.

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Enforceable Policy: means a provision in an approved program that is legally binding as developed under 11 AAC 114.270. Districts policies may be established to address potential effects to all coastal uses or resources.*

*Correcting the shortcomings of the current enforceable policies also entails modifications to AS 46.40.070 and AS 46.40.030 (b) to ensure future regulatory action cannot limit the ability of coastal districts to develop enforceable policies needed in their district to address potential impacts to uses and resources of the coastal zone.

* Correcting the shortcomings of the current enforceable policies also entails a revision to 11 AAC 14.270 to remove limitations placed on the ability of coastal districts to develop necessary policies.

The problem that the legislature was trying to address when duplication was prohibited arose when districts repeated state or federal administrative regulations without adding anything new, thereby giving due deference to a coastal district in the interpretation of a state or federal regulation. The DNR interpretation of the limitation went well beyond the problem and included everything under an agency authority regardless of whether the matter is specifically addressed in statute or regulation. This definition helps establish the districts' authority to establish policies appropriate to the district.

Important upland habitats: includes drainages, aquifers, and land, the use of which would have a direct and significant impact on coastal water. At a minimum, important upland habitats include areas identified as state game refuges, state game sanctuaries, state range areas, or fish and game critical habitat areas established under AS 16.20 or identified by any state agency or coastal district as a habitat the use of which has a direct and significant impact on uses or resources of the coastal zone.

Reinstating important upland habitat ensures that all coastal uses and resources are adequately protected.

Practicable: An alternative is practicable if it is consistent with sound engineering practice and not causing environmental, social, or economic problems that outweigh the public benefit to be derived from compliance with the standard which is modified by the term "practicable." It is the burden of the applicant to prove an alternative is not practicable.

The definition is the one used in 6 AAC 80.900 (20) for "feasible and prudent". Using practicable is not necessarily a bad adjective. It is the term used by the Corps and EPA when reviewing the mitigation sequence in their regulations. The revision of the state's definition now makes the intent of the same word comparable with the federal language which prefaces "practicable" with "the least damaging" practicable alternative.

Review Participant: Add regional citizens advisory councils (RCACs) to the definition of review participant in 11 AAC 110.990 (41).

RCACs were established following the oil spill of the Exxon Valdez tanker to provide citizen oversight. These councils were included prior to the 2004 revisions and should be reinstated as review participants to ensure their oversight responsibilities are properly acknowledged.

Riparian areas: include the area along or around a water body that at a minimum falls within the following distances, measured from the outermost extent of the OHW mark, or if there are

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contiguous wetlands, the outermost extent of wetlands associated with the waterbody. Insert into the definition the distances as found in 11 AAC 112.900 (c). The extent of riparian area may be modified if site-specific evidence indicates the zone of impacts would be larger or smaller.

Including associated wetlands before measuring the riparian areas ensures that all the riparian area is included and does not fall out of management because extensive wetlands are adjacent to a river, lake or stream.

Special concerns: special concerns are those that refer to a coastal use or resource of importance to the livelihood of Alaskan people or the well being of Alaskan resources.

This definition eliminates the difficulty with the current use of the word "unique" to describe concerns when developing policies or defining areas. The change allows coastal districts that have similar concerns to be able to develop policies and overcomes the limitations of districts for which an issue was of critical importance to that coastal district but not necessarily unique to that district.

Wetlands: return to the definition in 6 AAC 80.900 (19), which includes both fresh and salt water wetlands.

Including all wetlands is appropriate because uses and activities on upland wetlands within the coastal zone can have an impact on uses and resources of the coastal zone. Moreover, the federal government has been limited by the Supreme Court to cover many fresh-water wetlands because it was deemed the state's responsibility to assume management. The best way to ensure that all wetlands in the coastal zone are protected adequately is to include them all in the state's coastal zone.

Describe how the changes would potentially impact all ACMP participants:

The changes enhance the coastal districts' ability to develop appropriate enforceable policies and participate in the consistency review process in a meaningful way.

The changes limit DNR's ability (1) to override perspectives of review participants and (2) to skew the interpretation of the 2003-2004 changes to be more restrictive than intended by the Legislature.

Applicants will be responsible for presenting plans for sound development that would "preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations."

**IV.
Specific Changes
Recreating a Networked Program**

Statement of Problems with Concentration of Power in DNR:

In 2003, the Legislature eliminated the Coastal Policy Council and agreed to the transfer of the Habitat Division from ADF&G to DNR where it was placed in a separate office – the Office of Habitat Management and Permitting – and to the transfer of the ACMP from the Governor's Office to DNR where it also was placed in a separate office – the Office of Program Management and Permitting. In addition, the Legislature removed DEC permitting from the state- coordinated review for consistency with the ACMP. The result was that a coordinated state review of projects and activities for consistency with the ACMP was conducted by the same department that, with limited exception, issued the permits for the projects and activities under review. In addition, DNR has the authority to approve district plans and the enforceable policies. Through the regulations DNR developed and DNR's subsequent interpretations of the regulations, DNR proceeded to control the ACMP planning and permitting processes. DNR restricted the ability of local governments to develop enforceable policies in subject areas covered by the state statutes or regulations – including those areas under an agency's authority but not yet subject to specific agency regulation. Through this concentration of power, the ACMP, which is described as a "networked" program, has only one effective voice left in the ACMP – that of DNR. A partial solution to the concentration of power already has been enacted; the Habitat division has returned to ADF&G.

Statutory or Regulatory Citation, if applicable:

Both are involved and citations are too numerous to detail in this paragraph.

Explain your solution to the problem and explain how this would solve the identified problem:

There are several elements needed to rectify this problem:

- a. The restoration of the Coastal Policy Council, or comparable forum, to approve coastal district plans; program changes; and, program-related funding. The board would include representatives of coastal districts, state resource agencies, and the Division of Community and Regional Affairs (DCRA). Reinstate public participation provisions in 6 AAC 80.020.

Restoration of a CPC places policy decisions into a framework that compliments the networked nature of the ACMP. All those with a stake in the outcome are represented.

- b. Move the ACMP to DCRA in DCCED. This would require amendments to multiple sections of AS 46 and other statutes.

The advantages and disadvantages of moving the ACMP to DCRA are explained in a white paper prepared by Maureen McCrea, that is available upon request. The conclusion is that placing the ACMP into a department that does not issue permits but has been involved with the program since its inception generates multiple benefits ranging from no conflict of interest if the mandates an ACMP statewide standard or district policy are more stringent than the mandates of other permits under its purview to engaging a department that already has a relationship with coastal districts and is familiar with the planning elements of district coastal programs.

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- c. Require concurrence from all resource agencies for an elevation decision. This requires a change to AS 46.40.096 (d).

Requiring consensus on elevation decisions would restore balance to the ACMP; one agency would not be able dominate decision-making.

- d. Return DEC to the coordinated review process (described more fully in Chapter VI).

Describe how the change would potentially impact all ACMP participants:

Coastal districts would be allowed to develop enforceable policies that address issues of concern at the local level. DCCED would balance responses from coastal districts with those of the resource agencies to provide a more neutral decision-making environment.

State agencies would have a greater role in coastal consistency decisions.

Applicants would be subjected to the checks and balances implicit in an effective coastal management program. The consistency review would not necessarily extend the permit process; that was not substantively changed in 2003; its major revision was implemented in 2002.

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V.
***Specific Changes
District Programs***

Statement of Problems with District Programs:

District participation in the ACMP was affected by the 2003 legislation but sharply curtailed by the 2004 regulations. One reason Alaska has a networked program is it has more shoreline than the contiguous states of the U.S., a lower population density than any other state, and a paucity of data. The result is there is a wide variety of habitats and issues that require localized policies. In spite of this, the 2003-2004 revisions severely limited the ability of districts to establish enforceable policies to address local concerns. The policies could not provide greater specificity or address issues covered by other state and federal statutes and regulations – even if the regulations did not exist but the agency had the authority to prepare regulations. This included any statewide standard that included the sequence of avoid, minimize, and mitigate. Moreover, policies were required to be prescriptive and not performance-based and to address a policy area unique to the district. Any policies that could meet these criteria were further limited because many could be applied only to designated areas that were required to be defined on the basis of extensive data. As noted above, Alaska has a paucity of data and the DNR interpretation of the information needed for such designations far exceeded the ability of districts to provide it. Therefore, while it is appropriate for coastal districts to retain the ability to designate Areas Meriting Special Attention (AMSA's) and Special Area Management Plans (SAMP's), the limitation of policies in specific areas such as habitats and subsistence to designated areas only must be changed.

Regulatory Citation

These will be provided within the discussion of the solution.

Proposed Solution and Explanation how it would solve the Problem

There are several elements necessary to resolve these problems with district programs:

- a. Allow policies in areas in which state and federal statutes and regulations do not adequately address a district's needs. To achieve this, delete AS 46.40.030 (b) and move it to AS 46.40.070 (a)(2) and amend AS 46.40.070 (a)(2)(C)(ii) to specifically state that the criteria relate to written laws and regulations, not the ability of an agency to write a regulation.

Removing the limitation placed on coastal districts with respect to developing policies in areas addressed in state and federal statutes and regulations provides districts the opportunity to refine issues at the level detail appropriate to the districts. The modification still precludes repetition of state and federal language, which would ensure coastal districts would not receive due deference for a conflicting interpretation of the same language.

- b. Change "unique" to "important to the district" in AS 46.40.070(a)(2)(C)(iii).

The criterion for concerns to be "unique" to the coastal district likely is impossible to attain. Often the same concern is expressed by multiple districts, therefore, not unique to that district. Changing the adjective from unique to important retains the concept that policies need to be well thought out and appropriate to the district, but is possible to achieve.

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- c. Amend AS 46.40.070 (a)(2)(B) to allow either prescriptive or performance-based policies.

Prescriptive policies often limit applicants to a particular solution that either is not appropriate in a given situation or has been superseded by better solutions. This amendment would allow applicants flexibility in attaining compliance.

- d. Problems associated with designated areas require multiple solutions. First, remove the requirement that district policies that relate to subsistence, habitats, hazards, energy facilities, recreation, tourism, and historic and prehistoric areas can be applied only within designated areas. (11 AAC 114.250, 11 AAC 114.270, 11 AAC 112.210, 11 AAC 112.270, 11 AAC 112.300, and 11 AAC 300.320).

Identifying all areas that should be designated requires a level of data typically not available. The problem was exacerbated by the fact that DNR interpreted the regulations with a restricted point of view and denied almost all districts' attempts to establish designated areas.

Removing the requirement that policies related to subsistence, habitats, hazards, and historic and prehistoric areas be applied only within designated areas resolves problems with limited data and the ability of coastal districts to obtain what data there are. It also removes an impediment to the implementation of a district's program because current regulations restrict project reviews to those that would occur within designated areas. Removing designated areas from the ACMP allows consideration of a use or activity that directly or indirectly impacts uses or resources of the coastal zone anywhere it occurs. The solution would retain the districts' ability to designate Areas Meriting Special Attention (AMSA's) and Special Area Management Plans (SAMP's).

Eliminating the requirement for designated areas also addresses some of the concerns raised by the federal Office of Oceans and Coastal Resource Management 2007-2008 312 assessment of the ACMP.

Describe how the change would potentially impact all ACMP participants:

Coastal districts would be empowered to develop enforceable policies as necessary to achieve a meaningful district program.

State agencies will need to work with coastal districts to ensure district policies do not copy existing statutes and regulations. During project reviews, some agency decisions will need to be influenced by more restrictive policies of the ACMP.

Applicants will need to coordinate with coastal districts. Following the 2003-2004 revisions, applicants only needed to coordinate with DNR during the consistency review process.

VI.

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Specific Changes***Coordinated Review Process including the DEC Carveout******Statement of Problems with the Coordinated Review Process including the DEC Carveout***

The coordinated review process was modified substantially in 2002 in response to applicants' desire to limit the consistency review; the goal was to streamline and provide greater certainty in the review process. The changes in 2003 and 2004 exacerbated the limitations established in 2002. New limitations imposed in 2003-2004 were geographical, topical, and procedural. Specifically, the aerial extent of the coastal zone included in reviews was limited in many instances to only those portions of the coastal zone influenced by salt water. Activities outside these coastal waters, or "designated areas", even when they affected a use or resource of the coastal zone, were not included in the review. Topically, several statewide standards, such as the habitat standard and subsistence standard, were limited. Procedurally, coastal district participation was curtailed, the public had few policies on which to base comments, and DEC permits were carved out of from the coordinated review for consistency with the ACMP. The DEC "carveout" was established in response to specific problems related to air quality plans and oil discharge prevention and contingency plans. The solution – removing all DEC permits from the coordinated review created a new set of problems.

Solutions for most of the review limitations likely would be resolved with the solutions discussed in sections II-V. For example, lack of due deference for coastal districts as a result of limitations on their policies, is remedied in sections III and V. This section will address specifics with the review, such as scope of review if permits are inland of coastal waters; an exception from the 90-day timeline for federal permits to provide the State the full review time available to it under federal law; lack of ability to extend the review period to receive needed information from an applicant; and the DEC carveout. Among the problems associated with the carveout are lack of coordination among review participants, review participants' confusion when a project enters into another consistency review, curtailment of scope of review when review participants could not comment on air and water quality, especially when it was an integral issue in the project – and even more so if no DEC permit was needed for an activity to occur. The removal of RCACs as review participants is addressed in the section dealing with deficiencies in the definitions (section III. Definitions, Review Participants).

Regulatory Citations:

Multiple statute changes would be necessary.

DEC carveout sections directly related to the AS 46.40 include AS 46.40.040(b)(1) and AS 46.40.096(g), (i), and (k). Additional statutory changes would be necessary in other statutes. Regulatory changes related to the DEC carveout include changes to 11 AAC 114.270 (f), 11 AAC 114.310; 11 AAC 110.040 (except provisions that allow the coordinating agency to conduct single agency reviews at the request of DEC).

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Proposed Solution and Explanation of how it would solve the problem:**a. DEC Carveout**

To address the extensive confusion generated by the DEC carveout, the provisions for the carveout need to be removed. That, in fact, would remove the duplication that occurred when DEC permits needed a consistency review after the coordinated review had been completed. The carveout was a response to a problem that arose when consistency reviews were held up when DEC had permits that required final plans before they could be put out for public notice, such as occurred with air quality permits that covered operation, not just construction, and oil discharge prevention and contingency plans. The proposed solution would be to note those permits and provide for additional review for operational permits because these plans and activities would still need to be reviewed pursuant to all the statewide standards and enforceable district policies.

b. Scope of Review

Revise AS 46.40.096 (l) to allow the review of projects inland of the coastal zone if reasonably foreseeable adverse impacts on uses and resources of the coastal zone could be anticipated. This would enable the State to review projects and activities, including federal projects and activities that under the current statute are legislated out of review.

c. 90-Day Reviews

Amend AS 46.40.096 (o) and AS 46.40.086 (o) to allow reviews to extend beyond 90 days for federally authorized activities for projects and when additional information is needed to determine the consistency of an activity or project. The State has up to 6 months to find a federally authorized project consistent. Artificially shortening the time places the State in a self-imposed poor position to ensure the use or activity is consistent with the ACMP. Removing the constraint on a project timeline when requests are made for additional information necessary to make a determination as to the consistency of a project or activity based on a reviewer's need likewise enables the State to exercise its rights to a full review. The coordinating agency has the ability to deny bogus requests.

Describe how the change would potentially impact all ACMP participants:

Reviewers and applicants would not be confused by the multiple reviews for consistency needed when DEC reviews a project after all other aspects have been reviewed. The proposal to address air quality and oil spill contingency plans separately would minimize the number of times multiple reviews occurred and address the applicants concerns when construction is delayed for projects that need air quality or oil discharge prevention and contingency plans for operation.

Applicants would be affected if they could no longer run out the 90-day clock when asked for additional information. The State would no longer truncate its State's right to make full use of the federal timeframe to review projects for consistency with the ACMP.